In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-25

CHRISTOS STAMAS, PETITIONER

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of knowingly selling a firearm to a resident of another state, in violation of 18 U.S.C. (Supp. V) 922(a)(5). He was sentenced to eighteen months' imprisonment. The court of appeals affirmed (Pet. App. A).

Petitioner was a resident of Massachusetts and was not licensed to deal in firearms. He sold a firearm (a derringer) to an agent of the Treasury Department (Kenneth Lindquist), who resided and had his principal duty station in Maine. The sale oc-

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curred at a bar in Lowell, Massachusetts, where petitioner was employed. (Pet. App. A, pp. 13–14.)

Agent Lindquist was initially introduced to petitioner as Stanley Clark from Revere, Massachusetts. He testified that subsequently he told petitioner that he had moved to Maine. According to Lindquist, petitioner, when asked to sell him a firearm, expressed an immediate willingness to do so, as soon as a gun became available. (Pet. App. A, pp. 14–15.)

Petitioner testified in his own behalf, and denied that he knew Lindquist came from Maine. He also contradicted Lindquist's testimony concerning how the sale occurred, and asserted that the agent's actions amounted to entrapment. He testified that he told the agent that he was not in the business of selling firearms, but that the agent persisted in soliciting a purchase. While he did not deny making the sale, he claimed that he was merely holding the gun as collateral for a loan, and sold it to the agent because he assumed that the owner had authorized the sale. The district judge, at petitioner's request, instructed the jury on entrapment, and petitioner made no objection to the instruction given. (Pet. App. A, pp. 14–15; Pet. 4–5.)

Petitioner's principal challenge in this Court concerns his entrapment defense. The district judge properly submitted this issue to the jury, which, in finding petitioner guilty, decided on the basis of the conflict-

ing evidence that petitioner exhibited a "ready complaisance" to accede to the agent's solicitations, and thus was "already predisposed" to sell firearms unlawfully. See *Sherman* v. *United States*, 356 U.S. 369, 371, 375; *Masciale* v. *United States*, 356 U.S. 386, 388. Petitioner contends (Pet. 7–9) that predisposition alone should not be enough to permit a conviction based on government-induced activity; he urges instead a general rule, which he claims (Pet. 7–8) prevails in four circuits, that solicitation by a government agent constitutes entrapment as a matter of law unless the government shows that the agent had a "reasonable suspicion" that the person solicited was predisposed to violate the law. Petitioner makes this contention for the first time in this Court; he did not move for judgment of acquittal in the trial court, nor did he either submit a proposed instruction embodying "reasonable suspicion" or object to the entrapment instruction given. See Pet. App. A, p. 14. The issue, therefore, is not properly before this Court.

Moreover, contrary to petitioner's assertion, no circuit has actually required that the government support its actions by showing a reasonable suspicion of predisposition. The mention of "reasonable cause" in a headnote to *Swallum* v. *United States*, 39 F. 2d 390 (C.A. 8), is not a part of the court's opinion, which makes clear that the government need show only predisposition (without regard to its suspicion of such) to rebut an entrapment claim (see 39 F. 2d at 393). The opinions from the District of Columbia, Fifth and

Tenth Circuits cited by petitioner (Pet. 7–8) do in fact discuss this matter,[1] but do not purport to establish any general rule. Indeed, in a later case, the Fifth Circuit specifically held that "[e]vidence of a willingness or 'ready complaisance' to deal is sufficient" to refute entrapment. *Kivette* v. *United States,* 230 F. 2d 749, 754, certiorari denied, 355 U.S. 935. The courts of appeals in the other two circuits have also upheld convictions against claims of entrapment in the absence of specific proof that the soliciting agent had "reasonable" suspicions of unlawful conduct. See *Branson* v. *United States,* 293 F. 2d 882 (C.A.D.C.), certiorari denied, 368 U.S. 961; *Fletcher* v. *United States,* 295 F. 2d 179 (C.A.D.C.), certiorari denied, 368 U.S. 961;[2] *Marshall* v. *United States,* 258 F. 2d 94, 96–97 (C.A. 10), reversed on other grounds, 360 U.S. 310; *Marshall* v. *United States,* 293 F. 2d 561, 563 (C.A. 10), certiorari denied, 368 U.S. 898; *Lucas* v. *United States,* 355 F. 2d 245 (C.A. 10), certiorari denied, 384 U.S. 977. Compare *Lewis* v. *United States,* 385 U.S. 206, 208.[3]

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[1] See *Childs* v. *United States,* 267 F. 2d 619, 620 (C.A.D.C.), certiorari denied, 359 U.S. 948; *Weathers* v. *United States,* 126 F. 2d 118, 119 (C.A. 5); *Heath* v. *United States,* 169 F. 2d 1007, 1010 (C.A. 10).

[2] The dissents in *Branson* and *Fletcher* were based on the fact that the government had not shown "reasonable suspicion." See 293 F. 2d at 883; 295 F. 2d at 181–182.

[3] Petitioner also contends that the evidence of predisposition was insufficient, as a matter of law (Pet. 9–10). The court below explicitly rejected this claim (see Pet. App. A. pp. 14–15). The conflicting evidence on this issue presented a jury question, which the jury resolved against petitioner.

Petitioner also claims that plain error occurred during the prosecutor's summation by reason of his reference to possible state court proceedings, a matter as to which there had been no testimony before the jury (Pet. 11). Again, petitioner did not object at the time. More importantly, defense counsel first mentioned this matter in his summation, and the prosecutor's remarks were in response to this (see Pet. 5–6). In the circumstances, the court of appeals correctly held that the trial court's failure to exclude the prosecutor's statement *sua sponte* was not plain error (Pet. App. A, p. 16).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971